STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

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PUBLIC EMPLOYMENT RELATIONS BOARD

JAMES A. HUNSAKER, III, Appellant,	)	
and	)	CASE NO. 90-MA-13
STATE OF IOWA (DEPARTMENT OF EMPLOYMENT SERVICES), Appellee.	)	

DECISION ON APPEAL

This case is before the Public Employment Relations Board (PERB or Board) upon the Petition for Review of James A. Hunsaker, III (Hunsaker), filed pursuant to PERB rule 11.8, 621 Iowa Admin. Code 11.8 (19A,20), which seeks the reversal of a Proposed Decision and Order of a PERB administrative law judge issued December 14, 1990. In her Proposed Decision and Order the administrative law judge (ALJ) concluded that the State of Iowa had established just cause for its termination of Hunsaker's employment with the Iowa Department of Employment Services (DES) on January 23, 1990, and that his appeal from the prior, adverse ruling of the Iowa Department of Personnel (IDOP), filed pursuant to §19A.14(2),[1] should be denied.

Pursuant to PERB rule 11.9 and subrule 9.2(3), we have heard the case upon the record submitted before the ALJ. Oral arguments to the Board were heard on April 3, 1991, at which both parties were represented by their respective counsel: David H. Goldman for the Appellant and Michael K. Elliott for the Appellee. Pursuant to

[1]This and subsequent statutory citations, unless otherwise indicated, refer to the Code of Iowa (1989).

§17A.15(3), on this review we possess all powers which we would have had had we elected, pursuant to PERB rule 2.1, to preside at the evidentiary hearing in the place of the ALJ.

The State filed its brief to the Board on April 1, 1991. Hunsaker filed no brief at this stage of the proceeding, instead incorporating and relying upon his post-hearing brief to the ALJ.

Based upon our review of the record before the ALJ, as well as the parties' briefs and oral arguments, we make the following findings of fact and conclusions of law.

FINDINGS OF FACT

The Iowa Department of Employment Services is an agency of state government. Its organizational chart reflects a central administration consisting of the offices of the Director and Deputy Director, as well as the Administrative Services and Staff Services Bureaus. At the next level of organization DES splits into three separate divisions: the Division of Industrial Services, the Division of Labor Services and the Division of Job Service. It is the Division of Job Service which is principally involved in the instant proceeding.

The Division of Job Service is presided over by a Commissioner, under whom three bureaus operate: the Job Insurance Bureau, the Appeals Bureau and the Field Operations Bureau. Each of these bureaus is under the direction of a designated bureau chief. The Field Operations Bureau (FOB) is the largest organizational component within DES, employing over 500 individuals -- the majority of all DES employees.

Appellant Hunsaker joined DES in 1972 as an interviewer in Cedar Rapids, Iowa, and progressed through a number of positions within the agency until, in 1986, he was promoted to the position of FOB Chief -- the position he occupied at the time the events relevant to this case commenced -- by then-DES Director Richard G. Freeman. Within the state's merit employment system, Hunsaker was classified as a Public Service Executive (PSE) IV in his FOB post.

As FOB Chief, Hunsaker assumed responsibility over what was then FOB's 11 districts, which then operated 68 local Job Service offices providing services to the public throughout the state. Each local office's manager reported to a district supervisor, who in turn was under the direction of Hunsaker. One of Hunsaker's major responsibilities as FOB chief, as reflected on his performance plan (a document given to each state employee which defines the employee's duties and management's performance expectations), was to "monitor Field Operations budget, staffing allocations and financial agreements so that agency fiscal guidelines are met and staff and resources are effectively managed." With regard to that major responsibility, Hunsaker's performance plan indicated that it was expected that "staff and other allocations will be maintained at authorized levels."

DES receives its operating funds from a number of funding sources, with which it operates a multitude of employment-related programs. For example, during the 12-month period ending June 30, 1989, there was testimony that the FOB was administering over 100 different programs. The three funding sources providing by far the largest amounts of money for FOB's operations were the federal Employment Services Grant (ES), the federal Unemployment Insurance Grant (UI) and the state's surtax appropriation (Surtax).

The budgeting and administration of DES's operating funds was complicated and bears little resemblance to the management of a typical budget. For example, certain operating funds received by DES, such as those from the ES and UI grants, are restricted by federal regulations and may be used only for purposes directly related to the furtherance of the funding source's specific program. Consequently, unlike the typical household budget where expenditures beyond the amount originally earmarked for a given purpose may be offset by "borrowing" from another budget category in which funds remain available, regardless of their source, such shuffling of funds received from different funding sources is not always permissible within DES. Federal regulations prohibit the use of one grant's funds to offset overexpenditures in another. Should such a prohibited use of funds be discovered, and should the U.S. Department of Labor (DOL) determine that the redirected expenses were not properly chargeable against the grant used to "cover" the overexpenditure, the state is required to repay the amount of the disallowed expenses, using nonfederal funds.

The previously-mentioned Surtax funding source was originally created in state fiscal year 1988 by the Iowa General Assembly, which appropriated monies for DES's use in offsetting funding shortfalls in the federal programs. Consequently, overexpenditures in the federal ES or UI programs could be covered by using the

Surtax funds, but overexpenditures in one federal program were not to be covered with funds provided for the other.

Further complicating the administration and analysis of the DES budget is the fact that the calendar periods (at times referred to as plan years, program years or budget periods) of a number of programs operated with restricted-use funds do not coincide with the State's July 1-June 30 fiscal year, while other plan years do. Of particular relevance to the present case is the fact that the Surtax funding source and the ES program operate on a July 1-June 30 basis, matching the State's fiscal year, while the UI program operates on an October 1-September 30 plan year.

Funds received by DES from a given funding source, even those restricted to a particular program, are not necessarily channeled in their entirety to a single sub-entity within DES. For example, it appears that each of the three Division of Job Service bureaus, as well as the Administrative Services Bureau and the Staff Services Bureau, were allocated funds received from the UI funding source since each of those bureaus played some role in the furtherance of the UI program.

Although at all times relevant to this proceeding the DES director, who also serves as the commissioner of the Job Service Division, held the ultimate responsibility and authority to determine how certain funds received by DES would be apportioned or allocated among the various bureaus, it is clear that the director at times received input from others in making the allocation decisions. In 1987, then-director Richard G. Freeman established the Financial Management Committee which, during fiscal year 1989 (July 1, 1988 - June 30, 1989), was composed of the bureau chiefs and DES Deputy Director Jerry E. Mathiasen, who served as the committee's non-voting chair and its conduit to Freeman.[2]

The Financial Management Committee was advisory in nature and possessed only the power to make recommendations to Freeman on financial management issues. One of the committee's functions was to recommend, by individual funding source, the allocation each bureau should receive from the total amount supplied to DES by that source. After receiving the committee's recommendations, Freeman would establish the allocation of funds among various bureaus. As with the authority to establish these budget allocations, only Freeman possessed authority to alter allocations previously made.

Because a number of bureaus might be "eligible" to receive and use a given source's funds, a degree of competition, and at times friction, developed among bureaus, each seeking a greater share of the finite number of dollars provided by the funding source. Bureau chiefs were not infrequently dissatisfied with the size of the allocation for their respective bureaus. For instance, in August, 1988, the Financial Management Committee recommended that the FOB be allocated funds sufficient to staff itself during FY 89 at a level of 499 full-time equivalents (FTEs). Hunsaker was unhappy with the allocation and went to Freeman, who subsequently advised the committee that the FOB's 499 FTE allocation was

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[2]At its inception, Freeman served as the committee's chair, but subsequently replaced himself with Mathiasen.

unacceptable. The committee's subsequent amended recommendation of a 522 FTE allocation for the FOB was apparently adopted by Freeman, for it is clear that such was the FOB allocation for FY 89 until later in the year when DES's receipt of monies from a new funding source resulted in an increase of the FOB allocation to 523.88 FTEs.

Once budget allocations were established by Freeman, it became necessary for the agency to somehow monitor its budget status to insure that it did not spend funds beyond those which were available. In an attempt to provide agency managers with a tool to assist them in the fulfillment of this responsibility, the Administrative Services Bureau, in 1984, began to produce and distribute to managers a series of financial information reports referred to internally as "8X reports". Within the Job Service Division, monthly 8X reports were provided to each local office (or "cost center") manager, and summary 8X reports were provided monthly to those higher in the chain of command (i.e., district supervisors and the bureau chief), the summary reports combining the information contained on the reports received by that manager's subordinates. A separate 8X report was prepared for each funding source and listed, by various categories of expenditures (salaries, rents, telephone service, etc.), the amount of the allocation from that source which had been budgeted for that expense, the amount which had been spent for the month reported and the year-to-date expenditure. For each expenditure category, the 8X also projected what the year-end actual expenditure would be and provided a projected year-end variance, reflecting the difference between the budgeted or "plan" amount and the projected year-end expenditure.[3]

Another, perhaps more useful, financial management tool provided to bureau chiefs was the "status of funds" report prepared and disseminated monthly by the Administrative Services Bureau since November, 1988. Unlike an 8X report, which dealt only with a single funding source, the status of funds report presented a bureau chief with a list of all funding sources from which his or her bureau received funds. As to each source, the report listed

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[3]The projected year-end actual expenditures, and thus the projected year-end variances, were just that -- projections which could never be made with absolute precision. Essentially, the year-end expenditure projections for all regularly-reoccurring expenses were reached by multiplying the last month's expenditure in each category by the number of months remaining in the program year. Consequently, if the last month's expenditures for any given category were abnormally high, the system would project that high level of expenditures to continue for the remainder of the program year, thus increasing the projected year-end total and the likelihood that a negative (i.e., deficit) projected variance would appear on the report. It is clear, however, that all managers, including Hunsaker and his bureau's budget analyst, received training in the interpretation and use of the 8x reports, and other bureau chiefs testified that they were aware of the reports' potential weaknesses and nonetheless found them to be useful financial management tools.

The usefulness of the 8x reports received by the FOB for the ES funding source was reduced, however, by Hunsaker's failure or refusal to break down his bureau's ES fund allocation by either cost center or by expense category, even though all bureau chiefs had been asked to do so and all other chiefs had complied. Consequently, since FOB's ES funds were never budgeted for specific expense categories, but were instead carried in the "miscellaneous" expense category, other expenditure categories such as wages, supplies, telephone service, etc. all showed projected year-end variances which indicated deficit conditions -- thus reducing the usefulness of FOB's 8x reports as planning tools. However, even though so reduced in their effectiveness, the 8x reports did show the FOB's total allocation and total figures for current month expenditures, year-to-date actual expenditures, year-end projected actual expenditures and year-end projected variance, and thus should still have been of value to Hunsaker.

the bureau's allocation of funds (previously established by Freeman), the year-to-date expenses charged to the source, the percentage of the budget or funding period which had expired and the percentage of the funds which had been expended. By comparing the percentage of the funding period expired to the percentage of funds expended, the bureau chief could determine where he or she stood with respect to any given funding source.[4]

Thus armed with both 8X and status of funds reports, a bureau chief could determine with reasonable accuracy his or her bureau's financial status with respect to any given source as of the end of the month addressed by the reports.

Prior to FY 88, a bureau chief wishing to expend funds from his or her allocation was required to submit a request to make the expenditure to the Administrative Services Bureau, which would determine whether funds which could be properly used for the expenditure were available in the bureau's allocation. If not, the expenditure was rejected. Beginning in FY 88, however, Freeman bestowed upon the Job Service Division's bureau chiefs total autonomy and authority to hire bureau personnel and to spend the

[4]For example, if 50% of the budget period had expired but only 25% of the allocated funds had been expended, the bureau chief could see that he or she was then well within their allocation for that funding source. Conversely, if 50% of the budget period had expired but 75% of the allocated funds had been expended, the chief would be alerted that expenditures could not continue at the former rate if the bureau was to stay within its allocation.

Beginning with the report for the period ending April 30, 1989, the status of funds report was supplemented to also show, for each source, the year-end projected variance (from the 8x report) as well as the number of positions (FTEs) allocated for the program and the number of FTEs which had been charged to that source. Compare Exhibit 17 with Exhibit 18.

funds allocated to their bureaus, and reduced what had formerly been the veto power of the Administrative Services Bureau over expenditures to what appears to have been the purely ministerial role of processing the requests which were submitted to it. Requests for expenditures were returned to the bureaus without action only when they were incompletely or improperly filled out.

Although no example of the forms, if any, which were required for the hiring of personnel were admitted into the record, the record does establish that beginning in FY 88 a request for a purchase required a "division or bureau signature" and, rather than relying upon the Administrative Services Bureau for certification that funds appropriate for the requested expenditure were available, sought that information from the bureau chief, who would indicate that funds for the requested purchase were or were not available. In order to determine whether funds were available, or whether the expenditure was reasonable in view of the bureau's current financial standing, a bureau chief or designated subordinate could consult the bureau's most recent 8X and/or status of funds report.

Hunsaker received 8X reports throughout FY 89, and received status of funds reports for all months after October, 1988. Typically, both reports were produced and distributed toward the end of the month following the month reflected on the report.

In a Financial Management Committee meeting in December, 1988, Hunsaker moved that the committee incorporate into its minutes its "basic assumptions" concerning financial management. Among those assumptions was the following:

> Any bureau that is overspent at the end of a program or fiscal year may negotiate to "borrow" funds from other bureaus to cover their overspending; however, these "borrowed" monies may be paid back to the loaning bureaus from the borrowing bureau's next year's allocations. In other words: Over expenditures will be covered, but could be paid back to those bureaus who have generated the savings.

In February, after having reviewed the committee's minutes, Freeman directed a memo to the committee's members. Among the items discussed was Freeman's thoughts on the above-quoted "assumption". Freeman asked the committee to rephrase the item, adding:

> . . . I believe it to be inappropriate to speak in terms of "borrowing" funds from one bureau to another. In addition to my concerns over this strategy, I must remind each of you that you are individually responsible for maintaining proper expenditure levels for each of your bureaus. <u>Overexpenditures must not occur.</u> (Emphasis in original.)

No 8X or status of funds reports, or information reflecting the contents thereof, for months prior to November, 1988, were admitted at hearing. However, it is clear that the FOB's projected year-end variance for the ES program, as reflected on the 8X and (after the previously-mentioned format change) status of funds reports, was consistently a negative number, indicating a projection that the allocated funds would be overexpended if expenditures remained at their current levels.[5] Similarly, the status of funds reports for the months of November, 1988 through May, 1989, all showed that the percentage of FOB's ES funds already expended exceeded the percentage of the ES program's budget period which had expired, culminating with the report for the period ending May 31, 1989, which indicated that although 91.67% of the budget period had expired, the FOB had already spent 105.49% of the ES funds which it had been allocated.

The Financial Management Committee also had available to it the bureaus' 8X and status of funds reports. Although it is not clear from the record when the committee became concerned, it is clear that by February or March, 1989, the committee had become very concerned that FOB was in the process of overspending its allocation, due primarily to perceived FOB overstaffing and equipment purchases. Expenditures for staff salaries and wages, and those for the purchase of equipment, are interrelated due to the absence of a line item in bureau budgets for equipment. Consequently, for a bureau chief to purchase equipment while staying within the bureau's budget, he or she would have to reduce staff or hold vacancies open, thus saving dollars in the wages and salaries category which could be used for equipment purchases.

As previously mentioned, Hunsaker had been allocated just under 524 FTEs for the operation of his bureau, although in the

[5]The FOB's ES fund projected year-end variance on the reports for the months of November, 1988 through May, 1989, were as follows: November: -$3,826,728; December: -$3,741,608; January: -$187,316; February: -$531,065; March: -$402,643; April: -$1,239,495, and May: -$1,308,903.

spring of 1989 he was staffed at a higher level.[6] While FOB was thus not operating within its FTE allocation, and thus was not saving wage and salary dollars for equipment purchases, the committee was aware that Hunsaker nonetheless was continuing to purchase equipment for his bureau, even though testimony indicated that the FTEs utilized and paid by FOB had exceeded the bureau's allocation for some time.

As a bureau chief, Hunsaker was a member of the Financial Management Committee, which confronted him with its concerns. Clearly, the other bureau chiefs were aware that only a finite number of dollars were available to DES as a whole, were worried about the effect an FOB overexpenditure would have on their bureaus, and believed that since they were required to live within their budget allocations, whether they thought them adequate or not, Hunsaker should do the same. Hunsaker acknowledged that his bureau was overstaffed, and told the committee that he would take corrective action to bring his staffing under control.

However, Hunsaker appears to have taken no such corrective action. Instead, the number of FTEs employed by FOB continued to increase, rising from 541.49 in March to 558.13 in May. Equipment purchases also continued.

Beginning in the early spring of 1989, Edwin Frerichs, Chief of the Bureau of Administrative Services and a member of the

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[6]For instance, the status of funds report for the period ending March 31, 1989, indicates that FOB was staffed at 541.49 FTEs, which increased to 545.26 FTEs in April and further increased to 558.13 FTEs in May, 1989.

financial management committee, approached Freeman on several occasions whenever Hunsaker authorized more staffing or major equipment expenditures, to express concerns about Hunsaker's overexpenditures in FOB. When Freeman confronted Hunsaker with these concerns, Hunsaker, on each occasion assured Freeman that FOB had the funds available.

Hunsaker, although acknowledging his awareness of FOB deficit projections, was not unduly concerned even after being confronted by the Financial Management Committee. He testified that after hearing the committee's concerns he met with his budget analyst, Steve Brooks, and other management support staff, to try to determine why projected FOB deficits continued to show up. Apparently Hunsaker anticipated DES's receipt of supplemental funds, and thus an increase in his bureau's allocations, for he testified that he and his staff disagreed with "the financial management department on what funds were going to be available, so at that time we did not believe that we were going to be overspent."[7]

Hunsaker did become somewhat concerned about his bureau's financial situation in May, 1989, after reviewing the FOB status of funds report for the period ending March 31, 1989, which showed a projected overall FOB deficit of nearly $117,000. However, Hunsaker testified that he believed a deficit of that size could be addressed by actions such as freezing further hiring, reassigning staff from one funding source to another, or refraining from

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[7]Tr. at 944.

scheduled equipment purchases. Still, as previously noted, the bureau's FTEs employed increased to 558.13 for May, and although FTEs were reduced in June to 543, even that reduced level still exceeded the bureau's allotment of just under 524.

The Financial Management Committee, having seen no meaningful corrective action by Hunsaker, planned to confront him again at its June meeting. Hunsaker was not present at the meeting, a staff member attending in his place.

On June 20, 1989, Freeman sent a memo to Hunsaker which read, in part: "Please explain to me. How? Why? Your Bureau is $785,053 overspent and you continue to hire new employees. . . ."[8]

At the conclusion of FY 89 (June 30, 1989), the Field Operations Bureau was overstaffed by 21.26 FTEs and had spent a total of $626,519.85 on equipment. It was later determined that as of June 30, 1989, FOB had overspent its ES fund allocation by $950,878, and had overspent its combined allocation from all sources by $883,070. The FOB had been allocated 95% of the funds DES received from the ES grant, and its overexpenditure resulted in an agency-wide ES grant overexpenditure of $842,584. The agency as a whole had overspent all funding sources by $901,142.[9]

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[8]The source of Freeman's information regarding the $785,053 deficit cited in his memo is not revealed by the record. The most recent status of funds report, covering the period through May 31, 1989, and issued June 19, 1989, projected a year-end ES fund deficit of $1,308,903 for the FOB, and an overall bureau year-end deficit of $1,049,224.

[9]Exhibit 42.

At the conclusion of FY 89, the Administrative Services Bureau's Financial Management Section, which prepared the monthly 8X and status of funds reports, projected that FOB was going to overspend its three largest sources of funds -- Surtax, ES and UI -- by a combined total of $1,201,279. This was only a projection, because the UI grant's plan year would not expire until September 30, 1989.

DES was required to submit final plan year reports for the ES program to the DOL following June 30, 1989. Had it done so without making some adjustment, the Financial Management Section then believed the report would have shown that DES has overspent its federal grant for the ES program by $1,099,585. This was an admission to be avoided, because to overspend the ES program would, DES believed, have been a violation of what has been referred to as the federal "Anti-Deficiency Act".

Freeman, after receiving a recommendation from the Financial Management Committee, instructed the Financial Management Section's supervisor to make adjusting entries in the DES accounting system and to rerun the year-end reports. Although the record indicates that Freeman did not specifically order the pre-adjustment 8X and status of funds reports for the period ending June 30, 1989, to be destroyed, those reports were in fact destroyed. The adjusting entries effectively transferred a large sum of expenditures which had been charged against the ES program to the UI program, which still had three months to operate before the end of its funding period, and within which unexpended funds still existed.

It was later determined that this transfer removed $1,227,692 in expenditures previously charged against ES from that program's books, and that $1,099,585 of those expenditures had originated in the FOB. The adjustment created a result which made it appear, on paper, that DES had completed the ES plan year with an approximate $250,000 surplus in ES program funds. Of course, the transfer of the large amount of expenditures onto the UI books substantially reduced that program's operating funds for the remainder of its program year.

This was not the first time that such "adjusting entries" had been made by DES. Similar expenditure transfers had occurred on occasions in the past, although never ones involving amounts approaching that transferred after the close of FY 89.

Within the first two months of FY 90, the Financial Management Committee again met to consider bureau allocation decisions for the new fiscal year, and Freeman's allocations were ultimately transmitted to the bureau chiefs on August 23, 1989. Hunsaker was again not content with his allocation of 523 FTEs, and argued that FOB should be authorized to staff at a level of 549 FTEs. Apparently, FOB needed an additional $972,790 to fund the positions it desired.

Mathiasen, as chairman of the Financial Management Committee, asked a subcommittee to review the allocation situation and make suggestions for the full committee's consideration. Among the findings of the subcommittee, reflected in its October 19, 1989 report, was that had FOB not overexpended in FY 89, necessitating the transfer of expenses from ES to UI, FOB would have had a budget of $20,667,941 for FY 90, rather than the $19,568,357 it apparently had been allocated. The subcommittee made a number of suggestions as to how the funds necessary to provide the additional FTEs desired by FOB could be redirected to the bureau. It does not appear that FOB received the additional FTE allocation it sought, however, for a status report reflecting FOB's activities during the first quarter of FY 90 shows the bureau's staff allocation as 523 FTEs.

Hunsaker, however, continued to overspend. Despite his 523 FTE allocation, he used 560.79 in FY 90's first quarter. The Financial Management Committee warned Hunsaker that it had not noted any change in his FY 89 hiring or purchasing practices.

Although the record does not establish precisely when the attention began, it is clear that questions about DES concerning issues which included the agency's fiscal responsibility were raised both by the media and by individual members of the General Assembly. Media reports focusing on DES certainly appeared prior to October, 1989, and concerns about DES personnel relations, staff morale and management style, as well as its fiscal responsibility, had been called to the attention of individual legislators.

At least in part as a result of the media attention, a review study committee composed of seven legislators was formed for purposes including the examination of management and fiscal decisions and policies within DES, with particular focus upon the Division of Job Service. At the legislative study committee's initial meeting, conducted October 12, 1989, Freeman and Hunsaker, as well as other DES bureau chiefs, appeared and were questioned by committee members.[10]

On October 26, 1989, Erwin E. Frerichs, chief of the Administrative Services Bureau, forwarded a memo containing financial recommendations to Freeman. Frerichs expressed concern with DES's current policy of allowing each bureau to control its expenditures and budgets. He asserted:

> The financial straits of the Job Service Division have reached a point where the Bureau of Field Operations has spent so far beyond its means that that Bureau is threatening all activities of the entire department. Field Operations is in fact no longer spending its own funds but has moved far into the funds of other responsible bureaus. Field Operations is now in jeopardy of financial failure so severe that it will bring all other bureaus and the department into a ruinous state also. The department cannot politically afford such an action during normal times and must do anything possible to avoid such a catastrophic incident now.
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> I also have a serious concern that I and my staff are required to approve expenditures for the department by

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[10]Freeman and Hunsaker appear to have essentially escaped the pointed question asked concerning budget overexpenditures. The committee's minutes reflect that Representative John H. Connors "asked whether any of the divisions of DES had gone over their budgets", thus apparently referring to the recently-completed fiscal year. The committee's minutes reflect that "Mr. Freeman said that there is no overspending in any division as a whole, although it has been necessary to shift funds from one program to another. He added that the DES books balance by the end of the year, and are audited by both the state and federal governments. . . . Mr. Hunsaker responded to Representative Connors' question by stating that spending is over budget in some areas, under budget in others, but that the budget for the Bureau of Field Operations would balance by the end of the year."

Freeman thus appears to have generally acknowledged the transfer of expenditures from ES to UI, although the record does not establish whether its significance was appreciated by the committee. Hunsaker answered a question which inquired into a past situation by making reference to the fiscal year then in progress.

signing expenditure documents forwarded to General Services and Revenue and Finance assuring that "funds are available". Funds are no longer available for many of the staff and purchases which Field Operations in particular continues to authorize. I am concerned about certifying financial documents when we are aware that there are insufficient funds to pay for the goods and services or that the funds are being appropriated from another inappropriate fund source.

Frerichs recommended that Freeman take total charge of DES's finances and appoint him in the role of "comptroller", and that the Financial Management Committee be disbanded. He also set forth "ground rules" which were necessary for the Administrative Services Bureau to act as comptroller and financial planner for Freeman:

> 1. An absolute freeze on all BFO staff vacancies in field locations and the administrative office. In order to not penalize other bureaus and divisions for mis-management of financial resources, no units outside BFO will be effected [sic] by the staff freeze and allocated resource limitations unless dictated by reduction of work loads.
> 2. A hard freeze on increases in field office facilities expense until problems are resolved.
> 3. An immediate stop in BFO automation expansion using any funds other than special new grants or new monies.
> 4. All (Job Service Division) travel expenditures and related NPS items will be reviewed and changes recommended as appropriate to meet required reductions in expenses.

The 12-month period upon which Hunsaker's next performance evaluation was to be based ended on October 31, 1989. Although Freeman's evaluation of Hunsaker for that period is not dated, it does reflect that Freeman perceived Hunsaker to have totally failed to meet Freeman's expectation, as stated on Hunsaker's performance plan for that period, that "[s]taff and other allocations will be maintained at authorized levels." For that standard, Freeman rated

Hunsaker's performance as a "1" on a five-point scale, the lowest possible rating, which the evaluation form characterizes as "unacceptable" performance.

On November 1, 1989, William J. Yost, chief of the Job Service Division's Appeals Bureau and a member of the Financial Management Committee, wrote a memo to Mathiasen in which Yost urged that fiscal restraints be involuntarily imposed upon the FOB. Yost indicated that if it was "necessary that I as a bureau chief surrender my autonomy in managing my budget to accomplish this purpose, then so be it."

Yost testified that he was so uncomfortable with DES's financial position at that time that he was willing to give up his budget autonomy if that were necessary in order to stop what he characterized as FOB's "spending spree", especially after the DES officials' appearance before the legislative review study committee at which Yost felt Freeman and Hunsaker had, at best, misled the legislators about DES's financial condition, and had created a situation where DES was now involved in a coverup. Yost testified:

> There was no question about the fact -- and it was all over the agency -- that we had overspent. We had transferred funds in July, and here we were at a point where public inquiry was being made, and we were, at best, misleading [Representative Connors] and concealing from [the committee] the true state of our financial condition.[11]

On November 14, 1989, Freeman issued a letter to all DES cost center managers concerning new financial management policies, the effect of which was to make Frerichs DES comptroller as he had

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[11]Tr. at 505.

recommended, to place all Job Service financial transactions within the Administrative Services Bureau's control, and to approve all of the "ground rules" set out by Frerichs in his October 26 memo, with only minor changes.[12] As a result, individual bureau chiefs no longer enjoyed complete authority to spend their allocations, and the agency was returned to a situation similar to that which had existed before 1988, where the Administrative Services Bureau, rather than bureau chiefs, approved the expenditure of funds.

During November, 1989, Freeman met with Jacqueline Mallory, a Personnel Management Specialist who heads the DES human resource unit. Freeman asked about alternative personnel actions he could take within the agency, including transfers, promotions and terminations. Freeman indicated he was considering his options and mentioned Walt Malley,[13] Yost, Job Insurance Bureau chief Paul Moran, Staff Services Bureau chief Kenneth Hayes and Hunsaker. Of the individuals discussed, Freeman mentioned Hunsaker with reference to the issue of termination, and it was clear to Mallory that Freeman was considering a number of alternative actions, but had not yet decided what, if any, personnel moves he would make.

Mallory was asked to think about personnel alternatives prior to another meeting with Freeman. Although the record does not specifically reflect the substance of this subsequent meeting, it does reflect that such a meeting took place a few days later.

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[12]Compare Exhibit 71 with Exhibit 77.

[13]No detail about Mr. Malley's identity is revealed by the record.

Whether occurring in their second meeting or at some subsequent time, Freeman ultimately informed Mallory that he was removing Hunsaker from the FOB chief position and transferring him to Cedar Rapids as a district supervisor.

Freeman testified that he weighed a number of factors in reaching his decision to transfer Hunsaker to Cedar Rapids: Hunsaker's relationship with the other bureau chiefs (including the breakdown of effective communications between chiefs and the others' lack of support for Hunsaker), the FOB's overexpenditure of what Freeman perceived as an amount in excess of $1,000,000, other difficulties he believed Hunsaker was experiencing, and the advisability of getting Hunsaker out of Des Moines and the central administration office to avoid the "heat" generated by the media and legislative attention which was being given DES.

Although Freeman and Mallory's testimony concerning their various discussions is not entirely consistent, it is clear that they discussed possible personnel actions and scenarios which might develop should various contingencies occur. With regard to the transfer alternative, Freeman acknowledges he discussed with Mallory the possibility of eventually bringing Hunsaker back to DES central administration, although he maintains that he subsequently discarded the idea and considered the transfer he had decided upon to be a permanent assignment, insisting that he had no plans to bring Hunsaker back to Des Moines. Mallory, however, perceived the situation somewhat differently. She testified that Freeman characterized the Hunsaker transfer as a temporary move, and that he indicated the PSE IV position created by Ken Hayes' retirement as Staff Services Bureau chief would be held open, because Hunsaker's return to Des Moines in that position was an alternative, one which could bring Hunsaker back as Mallory's direct supervisor. Another alternative discussed, according to Mallory, was Hunsaker's possible return to Des Moines as head of a new DES data information unit. Freeman met with Hunsaker and discussed the idea of Hunsaker accepting the district supervisor position in Cedar Rapids. Hunsaker declined.

According to Freeman, he and Mallory had discussed such a contingency. Freeman testified that had Hunsaker not accepted the new position Freeman would have ultimately made it a requirement, and that if Hunsaker had still refused, the refusal would be deemed a voluntary resignation from DES.

When Hunsaker initially declined the Cedar Rapids assignment, Freeman emphasized that it would be a better move for him to accept the transfer. Hunsaker expressed concern that the transfer would be perceived by all as a demotion, and was unhappy with that anticipated perception. Consequently, apparently with the involvement of a DES district supervisor, Al Winston, who served as a sort of intermediary between Freeman and Hunsaker, an arrangement was negotiated between Freeman and Hunsaker under which Hunsaker would request transfer to Cedar Rapids as district supervisor, and would receive certain considerations for doing so.

On November 18, 1989, Mallory requested IDOP approval of the temporary reassignment of a PSE IV position (Hunsaker) to the Cedar

Rapids district office for a six-month period beginning December 22, 1989, where he would function as district supervisor. Since Hunsaker would be performing lower level duties and responsibilities in Cedar Rapids, IDOP approval of the "extraordinary duty" assignment was necessary in order to preserve for him the salary he had been receiving as FOB chief. Mallory's request stated that Freeman had decided to review DES's organizational structure and reporting relationships, and that during the six-month reassignment, DES would be assessing its needs and goals, and that by the end of that period "appropriate action will be taken."

According to Mallory, this paperwork was consistent with Freeman's indication to her that Hunsaker's transfer was temporary. Freeman, however, testified that his instructions to Mallory were simply to complete the paperwork necessary to see that Hunsaker was transferred to the Cedar Rapids post without a reduction in pay, and that despite the "temporary reassignment" language employed in the request to IDOP, he had determined that Hunsaker's transfer was permanent, and that it was also "somewhat disciplinary".

On November 27, 1989, pursuant to the arrangement previously negotiated, Hunsaker directed a memo to Freeman concerning his work assignment. Hunsaker's memo stated, in its entirety:

> I request that I be reassigned to the Cedar Rapids District Supervisor position effective December 22, 1989, pursuant to the agreements reached between you and I. I would expect to meet this week with the Cedar Rapids and Iowa City staff at their regular staff meetings Wednesday and Thursday. I will also visit all district offices before the start date to speak with staff.

Thank you for your support. I appreciate the personal advice and professional discussions we have had concerning this over the last three months.[14]

Hunsaker advised his deputy, Reynel Dohse, that he had accepted the transfer to Cedar Rapids to show he was a "team player" and to help out Freeman, who Hunsaker said was in trouble. At hearing, Hunsaker acknowledged that because of continuing scrutiny it was "getting a little warm" around DES for him and Freeman due to the prior spending practices. Hunsaker also told Dohse, at some time prior to his actual move to Cedar Rapids, that in his new assignment he would be contacting legislators and laying the groundwork to become commissioner.[15]

On November 28, 1989, Freeman issued a memo to all DES employees concerning a restructuring of DES effective December 22, 1989. Freeman indicated that, among other moves, Paul Moran (then Job Insurance Bureau chief) would become FOB chief, Hunsaker would become Cedar Rapids district supervisor, Yost would become acting chief of a restructured Job Insurance Bureau which included appeal functions, and, upon Ken Hayes' upcoming retirement, the Staff Services Bureau would be reorganized but would temporarily report to Deputy Director Mathiasen.

On December 22, 1989, Freeman's reorganization became effective and Hunsaker assumed his new role as a district

[14]Exhibit 36.

[15]Whether this reference was to the position of commissioner of the Job Service Division, or was intended to refer to the DES directorship or some other position, is not revealed by the record.

supervisor. As a result of the arrangement negotiated between Freeman and Hunsaker, not only did Hunsaker retain his PSE IV classification and sustain no reduction in pay in conjunction with the transfer, but he also was granted other considerations. Those included the use of a state car, the moving of his office furniture and personal computer to Cedar Rapids at state expense, additional remodeling expenses, the authorization to receive 45 days of personal living expenses, letters of commendation (from sources undisclosed by the record) and permission to take his deputy with him to his new assignment, if she elected to do so.

Also on December 22, 1989, Cynthia Eisenhauer was appointed by the governor to replace Freeman as DES director, effective January 8, 1990.

Freeman evaluated Hunsaker for his performance as FOB chief during the period October 31 - December 22, 1989. The undated evaluation is identical to Freeman's evaluation of Hunsaker for the period October 31, 1988 through October 31, 1989, Hunsaker again receiving a "1" (unacceptable performance) rating on the "staff and other allocations will be maintained at authorized levels" performance standard. Despite unacceptable performance on that standard, Hunsaker's overall rating was 3.47 (nearly midway between "competent" and "very good" performance), and Freeman checked the box on the evaluation form indicating his recommendation that Hunsaker receive a salary increase, even though Hunsaker, as a PSE IV, was already being compensated at a pay range higher than that of other district supervisors.

On January 2, 1990, Freeman wrote to Mallory concerning Hunsaker's PSE IV classification. His memo states, in its entirety:

> I agreed with Mr. Hunsaker that his current merit classification would not be changed, nor reviewed independently. We plan, pursuant to the Advisory Council and rural study committee recommendations, to review all District Supervisor classifications. At that time, if it is determined that Mr. Hunsaker should be a PSE III, from that date forward, he shall be redlined for the maximum period possible.[16]

Sometime in late December, 1989, or early January, 1990, Senator Richard Running, co-chairman of the aforementioned legislative study committee, inquired to the state auditor's office about the FOB budget overrun. A special examination was subsequently begun by the auditor's office to determine the causes and effects of the over expenditure.

On January 8, 1990, Eisenhauer assumed her new position as DES director. Freeman left state employment.[17]

Prior to assuming the DES directorship, Eisenhauer had seen media reports about the agency and had developed a sense that there were financial and organizational problems within it. She was

[16]The "redlining" mentioned in Freeman's memo was intended to refer to the concept of "red-circling" an employee's salary. Red-circling occurs, with IDOP approval, when an employee is transferred to a position at a lower pay grade and the employee's current salary exceeds the maximum for the new pay grade. In order to retain the employee's current pay, that salary can be "red-circled" for up to approximately one year before it is reduced to the maximum pay applicable to the new grade.

[17]The record does not establish the circumstances surrounding Freeman's replacement as director or his departure from the state's employ.

invited by Freeman to attend a meeting on January 5, 1990, where the financial situation was reviewed, and gathered further insight into the DES financial picture at that time.

Upon her assumption of control on January 8, Eisenhauer arranged meetings with the bureau chiefs. During those meetings the chiefs indicated that the agency's financial problems were the result of Hunsaker's reckless spending and hiring practices during his tenure as FOB chief.

Prior to January 23, 1990, Eisenhauer met with Barbara Buck, a deputy state auditor involved with the special examination which resulted from Senator Running's inquiry. During the auditor's exit interview Buck shared with Eisenhauer her impressions and conclusions about FOB's practices and responsibility for the overexpenditure of its ES allocation. During her examination, Buck had formed the impression that FOB did not feel its allocations were fair, and that it was intent on achieving certain objectives by spending or staffing as it pleased, without regard for its budget. Buck shared these impressions with Eisenhauer.[18] Buck

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[18]Although Buck formed her impressions on the basis of the auditor's special examination, rather than upon testimony at hearing, the soundness of her impression that FOB felt it was entitled to a larger allocation, and that it did not endeavor to stay within the funds it was allocated, is supported by the testimony of Brooks, FOB's budget analyst.

Brooks testified that he and Hunsaker were fully aware of FOB's allocations, but felt that they were "justified" in exceeding those allocations because FOB needed to do that in order to get its job done (Tr. at 1093). It is clear that Brooks, like Hunsaker, was relying upon additional funds becoming available, for he also testified that since funds were available outside FOB, but within the agency, and since he felt more money was coming in, that justified the expenditures of FOB, even though they were in excess of the bureau's budget allocation (Tr. at 1105).

provided Eisenhauer with documentation that FOB had overstaffed and had made equipment purchases exceeding $600,000 during FY 89, and that both the overstaffing and equipment purchases were material factors in the bureau's ultimate overexpenditure.

On or about January 16, 1990, Eisenhauer met with Mallory and inquired about procedures to be followed and rights to be accorded an employee should she decide to terminate the employment relationship. Mallory provided the requested information. Eisenhauer also spoke with IDOP Director Tom Donahue, to insure that she understood proper termination procedures.

On January 23, 1990, State Auditor Richard D. Johnson responded to Senator Running with the results of his office's special examination. Johnson's letter states:

> This letter is in response to your inquiry concerning a $1.1 million budget overrun in the Department of Employment Services, Field Operations Bureau (FOB). Our review indicates that the overrun is specifically related to the employment services program handled by FOB. This letter is intended to provide you with information concerning details, causes and effects of the overrun.
>
> FOB is one of several bureaus within the Job Service Division of the Department of Employment Services. Its function is to administer various federal programs, primarily employment services and unemployment insurance, and state programs, primarily the state surcharge program. These programs have stated purposes and restrictions on the types of expenditures from program funds, and also provide for maximum amounts reimbursable from the federal government. The employment services program is run on a July through June grant period and the unemployment insurance program is run on an October through September grant period.
>
> The program restrictions, the maximum grant amounts and the grant period for each program are critical in determining the amount and timing of reimbursements which will be received from the federal government, which is then included within the total Department of Employment

Services budget. Expenditures not meeting federal requirements are ultimately paid from state funds. For this reason, control of expenditures by program is crucial.

The total Department budget, including amounts for the grant programs, was allocated to the various bureaus within the department. The allocations were then detailed into various expenditure classifications by all bureaus except FOB. Because FOB did not more specifically detail the components of the bureau's allocation into expenditure classifications within each program, a significant level of expenditure control was not readily available.

When it was determined that expenditures had been charged against the employment services program which could not be covered from available grant revenue for the year ended June 30, 1989, expenditures of approximately $1.1 million were transferred to the unemployment insurance program. Based upon discussions with department personnel, the transfer was not made based upon where the expenditures would properly be charged, but rather on where there was cash available. Since the unemployment insurance program is on a September 30 year end, that program had available revenues which could be drawn down to provide cash to pay for expenditures already made. This effectively delayed the time at which the ultimate effects of the overexpenditure would be felt.

It is impossible to determine at this point what the specific expenditures were that resulted in the excess program costs. As described above, FOB did not further detail their allocation and also did not prepare a detailed listing of expenditures transferred to the unemployment insurance program. However, our review so far indicates that FOB exceeding their staffing by approximately 22 FTEs and spent over $600,000 on equipment purchases. These items would have to be viewed as significantly contributing to the overexpenditure during the year ended June 30, 1989.

It is also not possible yet to determine what the ultimate effects of the overexpenditure will be, particularly considering that a second transfer was made, after June 30, 1989, to move expenditures from the unemployment insurance program to the state surcharge program. The unemployment insurance program was reaching the end of its grant period, September 30, 1989, while the state surcharge program had a new allocation available on July 1, 1989. Again, no detail is available to document the specific expenditures, or their purpose, for which the transfer of approximately $700,000 was made.

The ultimate effects may range from all the expenditures ultimately being allowable under one or more specific programs, to most or all of the excess expenditures not being allowable and therefore the responsibility of the state. As part of our annual audit of the department, we will closely review FOB expenditures to determine how much, if any, of the expenditures are questionable under the federal guidelines, with final determination of allowability to be made by the federal government. We will also be reviewing the expenditures charged against the state surcharge program to reasonably ensure the appropriateness of those expenditures. To the extent that expenditures are disallowed as charged, the department will be faced with finding alternative funding through expenditure reductions in other programs or the addition of new funding.

Additionally, because FOB has not broken its allocation for FY '90 into detailed expenditure classifications, the possibility exists for this same type of situation to occur again if department personnel do not closely monitor financial activity. This monitoring should include a detailed review of current year expenditures to determine whether they have been appropriately charged and are eligible for anticipated funding.

Please feel free to contact us if we can provide additional information or be of further assistance.[19]

On January 23, 1990, Eisenhauer met with Hunsaker, who had been called to Des Moines. At that meeting, also attended by Paul Moran (now Hunsaker's direct supervisor), Eisenhauer showed Hunsaker the auditor's letter to Senator Running. Eisenhauer told Hunsaker of the conversations she had conducted with the bureau chiefs, reviewed her understanding of how expenditures had been authorized before November 14, 1989, and reviewed the agency's current financial position. Eisenhauer asked Hunsaker to explain

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[19]Exhibit 3.

why the overexpenditures occurred.

Hunsaker did not deny authorizing the overstaffing and overspending. He indicated, however, that he thought that if DES had financial problems it was the fault of the Administrative Services Bureau, not that of FOB. Hunsaker indicated he believed the 8X and status of funds reports contained errors, and showed Eisenhauer examples, but was unable to convince her there was anything misleading about the reports. Eisenhauer testified that at the commencement of the meeting she had not decided whether or not to terminate Hunsaker's employment. However, her perception of Hunsaker during the meeting was that he displayed an arrogant, cavalier attitude toward the management of the agency's resources, and she decided that discharge was appropriate.

Eisenhauer then presented Hunsaker with a discharge letter she had previously prepared for use in the event she decided to discharge. The letter stated, in part:

> The State Auditor released a special audit report on January 23, 1990, which holds you responsible for authorization of overexpenditures exceeding one million dollars in the bureau of field operations during fiscal year 1989 while you were bureau chief.
>
> Because of the sweeping impact these overexpenditures have had on the entire agency and because such negligence in the management of public resources cannot be tolerated of managers in DES, your employment with DES is terminated effective the end of the workday today.
>
> In accordance with Chapter 581 IAC 3 11.2(19A), the appointing authority has authority to take any disciplinary action up to and including discharge for any of a number of reasons, including negligence, inefficiency, inadequacy in the performance of assigned duties, and conduct which adversely affects the agency of employment.

The letter concluded with a recitation of IDOP subrule 12.2(6), concerning the rights of a discharged employee to appeal the discharge to the IDOP director.[20]

As a result of the FY 89 overexpenditure and a projected DES deficit in FY 90, exacerbated by a potential reduction in federal funds, Eisenhauer instituted a DES financial recovery plan designed to cut costs and save $1.5 million. The plan included a freeze on new agency hires and upward employee reclassifications, the cancellation of planned purchases, delays in the upgrading or replacement of computers, curtailment of employee travel and training, a freeze on the purchase of furniture or equipment, actions to reduce utility expenses, reductions in publication subscriptions and the institution of an employee voluntary furlough program, under which each DES employee was asked to take three days off without pay. Activity in several already-funded DES programs, some of which were already underway, was curtailed or postponed and those funds redirected, with DOL consent, to assist with the financial recovery.

Hunsaker had appealed his termination pursuant to IDOP rules. On March 5, 1990, the IDOP director's designee denied his appeal and Hunsaker subsequently filed his PERB appeal of the director's response pursuant to §19A.14(2).

The auditor's single audit report for FY 89 identified the $1,099,585 in FOB expenses originally charged to the ES program and then transferred to the UI program as a "questioned cost", since no

[20]Exhibit 24.

supporting documentation was available to support the amount of, or the reasons for the expenditure transfers, and since federal regulations provide that any excess cost over the federal contribution under one grant agreement is unallowable under other grant agreements.[21]

As of the date of hearing, the DOL had not yet decided whether the questioned cost would be allowed or not, and thus it had not yet been determined whether the state would be required to reimburse the federal government from nonfederal funds. In order to avoid a reimbursement situation, DES had taken the position in its contacts with DOL that although the transfer of expenditures had occurred, those transferred to the UI program could have been properly charged to that program originally, and thus should not be disallowed.

Section 19A.14(2), under which Hunsaker's PERB appeal was brought, provides:

> 2. Discipline resolution. A merit system employee, except an employee covered by a collective bargaining agreement, who is discharged, suspended, demoted, or otherwise reduced in pay, except during the employee's probationary period, may bypass steps one and two of the grievance procedure and appeal the disciplinary action to the director within seven calendar days following the effective date of the action. The director shall respond within thirty calendar days following receipt of the appeal.
>
> If not satisfied, the employee may, within thirty calendar days following the director's response, file an appeal with the public employment relations board. The employee has the right to a hearing closed to the public, unless a public hearing is requested by the employee. The hearing shall otherwise be conducted in accordance with the rules of the public employment relations board

[21] See Exhibit 90.

and the Iowa administrative procedure Act. If the public employment relations board finds that the action taken by the appointing authority was for political, religious, racial, national origin, sex, age, or other reasons not constituting just cause, the employee may be reinstated without loss of pay or benefits for the elapsed period, or the public employment relations board may provide other appropriate remedies. Decisions by the public employment relations board constitute final agency action.

CONCLUSIONS OF LAW

The ALJ, appointed pursuant to §17A.11(1), issued a proposed decision as contemplated by §17A.15(2). Upon the filing of Hunsaker's timely petition for review we assumed, pursuant to §17A.15(3), full responsibility for deciding anew all issues of fact and law. Tussing v. George A. Hormel & Co., 461 N.W.2d 450, 451-52 (Iowa 1990).

Although Hunsaker concentrated upon a single issue in his oral argument to the Board, he effectively incorporated by reference all arguments presented to the ALJ:

1. That Eisenhauer was not free to impose discipline upon him for his job performance in FY 89 because he had already been disciplined for such performance by her predecessor;

2. That Eisenhauer was not free to impose discipline upon him for his job performance in FY 89, even if her predecessor's actions did not amount to discipline, because her predecessor fully evaluated his performance and deliberately decided upon action to be taken regarding Hunsaker's employment,[22] and

[22] This prong of Hunsaker's argument was identified by his counsel as the central issue before the Board.

> 3. Even if Eisenhauer was free to impose discipline upon him for his job performance during FY 89, no just cause existed for the termination of his employment on that ground.[23]

We will address the last of these issues first and determine whether, absent the existence of some legal bar to Eisenhauer's authority to discipline, just cause existed for the termination of Hunsaker's employment with DES. In doing so, we will address the due process issue identified by Hunsaker during oral argument.

Since §19A.14 was amended to establish PERB as the final step in the administrative procedure available to a merit system employee who challenges disciplinary action, only a few such cases have reached the Board, and those have been disposed of on procedural grounds. Consequently, the instant case represents the Board's first opportunity to consider and apply the §19A.14(2) "just cause" standard, despite the fact that our ALJs have done so in a good number of cases.

"Just cause" is not defined by the statute. However, IDOP Rule 11.2(19A) provides that employees may be subject to disciplinary action, including discharge, when based on a standard of just cause, for any of the following reasons:

> inefficiency, insubordination, less than competent job performance, failure to perform assigned duties, inadequacy in the performance of assigned duties, dishonesty, improper use of leave, unrehabilitated substance abuse, negligence, conduct which adversely affects

[23]In oral argument before us, Hunsaker highlighted the question of whether the "perfunctory" notice and opportunity to respond he was accorded at his meeting with Eisenhauer complied with due process.

> the employee's job performance or the agency of employment, conviction of a crime involving moral turpitude, conduct unbecoming a public employee, misconduct, or any other just cause.

Our review of the just cause decisions issued by PERB ALJs pursuant to Chapter 19A in the past reveals that while some have adopted a regimented approach focusing upon the presence or absence of what various private-sector labor arbitrators have identified as the "elements" of just cause,[24] others have taken a less-structured approach which considers all the circumstances of each case as presented by the record.[25] While not suggesting that the various "elements" of just cause which have been identified and applied by arbitrators, and at times by our ALJs, are not relevant or may not be properly considered in deciding a §19A.14(2) case, we believe that the less-inflexible analysis of the record which considers the totality of each case's circumstances, rather than simply the presence or absence of certain elements, is more appropriate. In forming this opinion, we are cognizant of the pronouncements of the Iowa Supreme Court concerning another statutory scheme which also requires a "just cause" analysis.

The provisions of chapter 279 also require just cause for the termination of continuing teacher and school administrator contracts. In a number of cases, the supreme court has had occasion to discuss the chapter 279 "just cause" termination standard, and we can perceive no reason why the legislature's use

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[24]See, e.g., Iowa Department of Corrections/Smidt, 89-MA-02.

[25]See, e.g., Iowa Department of Corrections/Lang, 87-MA-09.

of the identical term in §19A.14(2) should be interpreted differently in merit employee termination cases.

According to the supreme court, each case "must be evaluated on its own circumstances to determine if just cause exists." Munger v. Jesup Community School Dist., 325 N.W.2d 377, 378 (Iowa 1982).[26] The inadvisability of following an inflexible, regimented analysis in just cause cases was recognized by the supreme court in Briggs v. Hinton Community School Dist., 282 N.W.2d 740 (Iowa 1979):

> Probably no inflexible "just cause" definition we could devise would be adequate to measure the myriad of situations which may surface in future litigation. It is sufficient here to hold that in the context of teacher fault a "just cause" is one which directly or indirectly significantly and adversely affects what must be the ultimate goal of every school system: high quality education for the district's students. It relates to job performance including leadership and role model effectiveness. It must include the concept that a school district is not married to mediocrity but may dismiss personnel who are neither performing high quality work nor improving in performance. On the other hand, "just cause" cannot include reasons which are arbitrary, unfair, or generated out of some petty vendetta.

Id. at 743.

The cases make it clear that the court has at times considered other factors (which are not unlike the "elements" of just cause used in some of our ALJs' prior decisions) to be relevant. See, e.g., Sioux City Community School Dist. v. Mroz, 295 N.W.2d 447 (Iowa 1980), where the court considered the fact that the terminated teacher was given no real opportunity to remedy the

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[26] See also Fort Madison Community School Dist. v. Youel, 282 N.W.2d 677 (Iowa 1979); Sioux City Community School Dist. v. Mroz, 295 N.W.2d 447 (Iowa 1980).

complaints against him, and Munger v. Jesup Community School Dist., supra, where the court considered relevant the fact that the terminated teacher was trying his utmost to do what was expected of him.

Consistent with the courts view of just cause in teacher termination cases, we believe that a §19A.14(2) just cause determination requires an analysis of all the relevant circumstances concerning the conduct which precipitated the disciplinary action, and need not depend upon a mechanical, inflexible application of fixed "elements" which may or may not have any real applicability to the case under consideration.

I.

Such an analysis in the present case leads us inexorably to the conclusion that if no legal bar to Eisenhauer's termination of Hunsaker existed, just cause for such termination was present in abundance.

In the letter of termination given to Hunsaker, Eisenhauer cited the IDOP Rule 11.2 reasons of "negligence, inefficiency, inadequacy in the performance of assigned duties, and conduct which adversely affects the agency," as being the reasons for Hunsaker's discharge. She particularly emphasized the "sweeping impact" Hunsaker's overexpenditures have had on the entire agency, and Hunsaker's negligence in the management of public resources in the termination letter (Exhibit 24).

Hunsaker knew, or certainly should have known, that one of his major responsibilities as FOB chief was to administer the bureau's staffing and spending so as to stay within the limitations imposed by the funds which it had been allocated. He had obviously been successful in the past, for prior to FY 89 the FOB had completed fiscal years with surplus funds. This ability to operate within his allocation had been recognized on Hunsaker's annual performance evaluations.

However, in FY 89, something changed. Whether it was the result of Hunsaker's unhappiness with the FOB allocation Freeman had made, or some other reason, it seems apparent that Hunsaker decided to operate his bureau the way he thought it should be operated, essentially without regard to whether his spending and staffing resulted in FOB's overexpenditure of restricted-use funds.

Although we question whether Freeman's February, 1989, reminder to the Financial Management Committee that "overexpenditures must not occur" should have been necessary, it is apparent that Hunsaker, despite this clear restatement of upper management's expectations and despite complaint and confrontation by members of the committee, consciously continued on his previously-set course toward a major overexpenditure of ES grant funds.

That Hunsaker was betting on being "bailed out" by the receipt of additional funds, either through supplemental grants or by transfers from the allocations of other bureaus, is apparent from his testimony that he disagreed with "the financial management department on what funds were going to be available. . . ." Also enlightening as to Hunsaker's attitude toward his obligation to stay within FOB's financial allocation was Brooks' testimony that he and Hunsaker, although fully aware of the limits of FOB's allocations, felt that they were "justified" in spending beyond those amounts because they believed it was necessary to do so in order to get the bureau's work done. Brooks' testimony further confirms our conclusion that he and Hunsaker were relying upon the receipt of additional funds from some source, and that they did not believe the bureau's financial allocation should reflect the limits of its spending capabilities since unexpended funds still existed within DES, albeit outside FOB.

Hunsaker's attitude toward finances thus appears to have been that not only was his allocation his, but that any new DES money, as well as unspent money allocated to other bureaus, should also be his, despite the fact that the allocations of the various bureaus had been established early in FY 89.

Hunsaker apparently believed that the ability to hire more staff and spend more money would enhance FOB's ability to provide services to its clientele. While this may be true, it does not alter the fact that the ultimate goal of every agency of state government, and of every component thereof, must be to fulfill its statutory responsibilities within the limitations imposed by the reality that government operates with public funds, that those funds are finite, and that it is legislators and officials higher than bureau chiefs who are charged with the responsibility of allocating these scarce funds amongst the various components of state government.

We do not believe that it can be seriously argued that FOB's $950,878 ES grant overexpenditure, and the questionable transfer of nearly $1.1 million in FOB ES expenditures to the UI grant which it precipitated, did not have a significant adverse effect upon DES's employees and its ability to meet its goals.

While the record bears out Hunsaker's observation that the DOL may yet approve the questioned transfer of expenditures from ES to the UI grant, and that the state may thus ultimately escape the need to reimburse the federal government for those questioned costs, it is equally clear that the potential for an adverse DOL decision was a substantial motivation for Eisenhauer to institute the DES financial recovery plan soon after she assumed the directorship. That plan significantly impacted numbers of DES employees by freezing anticipated employee reclassifications, curtailing employee travel and training and by necessitating the implementation of the furlough program, whose participants suffered the loss of wages. Perhaps more significantly, DES's provision of services to the public was adversely effected because of the perceived need to halt the progress of already-funded programs or programs already in progress, delay the upgrading of computerized functions and freeze the purchase of needed new equipment.

On appeal, Hunsaker asserts that the "perfunctory" notice and opportunity to respond which he was accorded before his termination deprived him of due process of law, and that a finding that just cause existed for his termination is thus precluded.

Without doubt, a public employee who enjoys a property right in continued employment which is created by existing rules or understandings which stem from a source such as state law is entitled to due process before that property interest may be extinguished. Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). The question of exactly what process such an employee is due was subsequently addressed by the United States Supreme Court in Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). Assuming that Hunsaker did enjoy a protected property interest in continued employment, all that Loudermill requires, in order to accord him due process, is a "hearing" which provides notice and an opportunity to respond. However, no full adversarial evidentiary hearing is required:

> [T]he pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions -- essentially, a determination of whether there are reasonable grounds to believe the charges against the employee are true and support the proposed action. (Citation omitted.)
>
> The essential requirements of due process . . . are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. (Citation omitted.) The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. (Citations omitted.) To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.

Id., 470 U.S. at 454-45.

Such a pretermination process, coupled with a full post-termination administrative procedure such as we are now involved in, is the extent of the due process that is required.

Our review of the record leads us to the conclusion that Hunsaker was accorded the pretermination due process prescribed by Loudermill. In her pretermination meeting with Hunsaker on January 23, 1990, Eisenhauer provided the required "initial check against mistaken decisions". She showed Hunsaker the auditor's letter to Senator Running concerning FOB's overexpenditures, told him of the conversations she had conducted with the bureau chiefs regarding the agency's financial problems and FOB's overexpenditures, and reviewed her understanding of how expenditures had been authorized during FY 89. Eisenhauer thus provided Hunsaker with notice of the charges and an explanation of the evidence against him. When provided with an opportunity to explain why the overexpenditures had occurred (Hunsaker's opportunity to present "his side of the story" as required by Loudermill), he did not deny authorizing the overstaffing and overspending, but instead attempted (apparently unconvincingly) to shift the blame to the Administrative Services Bureau.

Eisenhauer was unimpressed and, perceiving Hunsaker as displaying an arrogant, cavalier attitude toward the management of DES's resources, made the decision to terminate and presented Hunsaker with the discharge letter she had prepared in the event such a contingency arose.[27] We do not read the Supreme Court as indicating that due process requires more.

Although we have indicated that just cause determinations in §19A.14(2) cases should be based upon a consideration of all the circumstances of each case, rather than simply upon an "elemental" approach, we have nonetheless considered each of the factors which the ALJ felt were essential to a just cause determination. That consideration has revealed nothing which would cause us to alter our conclusion that just cause existed for Hunsaker's termination.

Consequently, we conclude that if no legal barriers to Eisenhauer's imposition of discipline upon Hunsaker were present, issues discussed in Divisions II and III, <u>infra</u>, the state has established that just cause existed for the termination of Hunsaker's employment with DES.

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[27]Section 19A.9(16) requires that IDOP adopt rules providing that a person discharged shall be given a written statement of the reasons for the discharge within 24 hours. IDOP subrule 11.2(4) was adopted in response to this statutory directive, and requires the provision of such a notice. As Hunsaker points out in his brief to ALJ, which was incorporated by reference during his argument on appeal, the written statement given Hunsaker (<u>see</u> p. 33, <u>supra</u>) does not address his actions during FY 90, but instead relies upon the FOB's FY 89 overexpenditures, their impact upon DES and Hunsaker's negligence in the management of public resources. He argues that this notice, required by §19A.9(16) and IDOP subrule 11.2(4), restricts the state to showing just cause for discharge based only upon those reasons. We agree. Although Hunsaker's performance as FOB chief during FY 90 might also have provided just cause for discipline, we believe we are constrained by the statutory requirement that the written statement contain <u>the</u> reasons for the discharge, and that the presence or absence of just cause must thus be determined upon those reasons alone. Consequently, we have given no consideration or weight to the evidence concerning the adequacy of Hunsaker's FY 90 job performance in reaching our conclusion in Division I.

II.

We thus confront the issue of whether a legal barrier existed which precluded Eisenhauer's discharge of Hunsaker for the just cause we have concluded did exist.

In the first of the two prongs of his argument that such a bar existed, Hunsaker asserts that he had been disciplined for his job performance in FY 89 when Freeman reassigned him to Cedar Rapids, and that his subsequent termination, without his commission of a new offense and without Eisenhauer's acquisition of additional information not known by Freeman, was precluded by §19A.9(16) and IDOP rule 11.2.

Hunsaker's legal theory is supported not only by arbitration awards which recognize and apply the doctrine of industrial "double jeopardy", but also by mandatory precedent of the Iowa Supreme Court. In Hall v. Iowa Merit Employment Comm'n., 380 N.W.2d 710 (Iowa 1986), the supreme court held that the Department of Human Services could not again discipline an employee who had previously been disciplined for the same conduct when the initial discipline had become the final action of the agency.[28]

Consequently, if Freeman's reassignment of Hunsaker to Cedar Rapids was the imposition of discipline for his FY 89 job performance and became DES's final agency action, Eisenhauer was precluded from imposing additional discipline for the same conduct.

[28] Hall arose before §19A.14 was amended to substitute PERB in the place of the Merit Employment Commission as the final administrative step in the appeal procedure available to disciplined merit system employees.

We do not, however, believe that Hall controls our decision in this matter, for we cannot conclude that Hunsaker's reassignment constituted discipline.

Section 19A.9(16) provides for IDOP's adoption of rules concerning the discipline of merit system employees. IDOP rule 11.2(19A), promulgated as required by §19A.9, initially provides:

> 581-11.2(19A) Disciplinary actions. In addition to less severe progressive discipline measures, any employee is subject to any of the following disciplinary actions when based on a standard of just cause: suspension; reduction of pay within the same pay grade; disciplinary demotion; or discharge. Disciplinary action involving employees covered by collective bargaining agreements shall be in accordance with the provisions of the agreement. Disciplinary action shall be based on any of the following reasons: inefficiency, insubordination, less than competent job performance, failure to perform assigned duties, inadequacy in the performance of assigned duties, dishonesty, improper use of leave, unrehabilitated substance abuse, negligence, conduct which adversely affects the employee's job performance or the agency of employment, conviction of a crime involving moral turpitude, conduct unbecoming a public employee, misconduct, or any other just cause.

Rule 11.2(19A) thus enumerates four specific forms of discipline, including disciplinary demotion and discharge, and also contemplates the imposition of "less severe progressive discipline measures."

Although witnesses testified that they considered Hunsaker's reassignment to have been a demotion, it clearly was not. IDOP rule 1.1(19A) defines "demotion" as "the change of a non-temporary employee from one class to another having a lower pay grade." Hunsaker was not changed from his existing class (PSE IV) to another having a lower pay grade.[29] Nor do we believe that Hunsaker's transfer to Cedar Rapids amounted to, or was intended as, a form of less severe discipline. The record paints a different picture.

DES generally, and Freeman and Hunsaker specifically, were in trouble after the close of FY 89. Hunsaker, it would later be determined, had overspent his bureau's ES allocation alone by over $950,000, and at that time DES appears to have believed the overexpenditure was even greater. Freeman had presided, essentially ignoring Hunsaker's fiscal irresponsibility despite the waving of red flags about him, and even contributed to the problem by accepting Hunsaker's representations that FOB had the necessary funds available. Freeman had all of the same financial reports available to him as did Hunsaker and the Financial Management Committee, yet despite the dire financial problems predicted in those reports, he does not appear to have become really concerned about Hunsaker's activities until late June, 1989, when he finally called on Hunsaker to explain why FOB continued to hire new employees even though it was already overspent.

By the fall of 1989, however, the fat was in the fire. The media was on to DES's problems, as was the legislative review study committee, whose activities were continuing. Questions were being asked about DES's financial situation and practices, and while Freeman and Hunsaker had apparently deflected the committee's

[29] In his brief and in oral argument, Appellant conceded that no demotion within the meaning of IDOP rules had occurred.

October 12 inquiries about overspending, at least one bureau chief felt that Freeman and Hunsaker had lied to the committee or, at best, had deliberately misled its members. Freeman and Hunsaker certainly had no guarantee that the scrutiny would not continue, or even increase.

An experienced administrator, Freeman felt the heat and wanted to cool things off. He perceived that Hunsaker, while under his direct supervision, had overspent the FOB's allocation by over $1 million. We find it inconceivable under the circumstances that Freeman did not feel that his own position was in jeopardy.

But Freeman and Hunsaker had a long history, and were viewed as friends. Freeman had been in a supervisory position over Hunsaker for approximately 14 years, and had personally elevated him to chief of the bureau which employed over 50% of the agency's total staff. Widespread recognition of Hunsaker's abject failure in the area of fiscal responsibility during FY 89 would not reflect favorably upon Freeman. Although Freeman did not meet with Mallory to discuss possible personnel actions until November, 1989, it appears that Freeman and Hunsaker had discussed the situation no later than September, for the transfer request Hunsaker ultimately submitted on November 27, 1989, expresses thanks to Freeman for the "personal advice and professional discussions we have had concerning this [reassignment] over the last three months."

While Freeman ultimately acknowledged that a motivating factor in Hunsaker's reassignment was to get Hunsaker out of Des Moines to avoid the heat generated by the media and legislative attention, he would have us believe that Hunsaker's reassignment was disciplinary in nature. We do not view Freeman's credibility in such a favorable light that it overcomes clearly-established facts which militate against a conclusion that the reassignment was disciplinary.

Freeman and Hunsaker negotiated the terms of Hunsaker's transfer -- hardly a characteristic of true discipline. At some time after the transfer became effective, and despite Hunsaker's continued overstaffing in FY 90, Freeman recommended that Hunsaker's salary be increased, even though their arrangement had left Hunsaker in his PSE IV classification where he was already being paid at a rate higher than the other district supervisors. Freeman approved special privileges for Hunsaker in connection with this supposed discipline -- 45 days of personal living expenses, remodeling authorization, the apparently-unprecedented moving of Hunsaker's furniture and computer at state expense, the use of a state car and permission to take his deputy with him to Cedar Rapids if she elected to go. Freeman also agreed to red-circle Hunsaker's pay for the maximum period possible should he remain in the district supervisor position and eventually be reclassified downward.

Even on its face the transfer was not disciplinary, but voluntary. Hunsaker, who acknowledged that things were "getting a little warm" for him at DES, formally requested reassignment to the Cedar Rapids district supervisor position and, obviously recognizing the peril his mentor was in, told his deputy that he had gone along to show that he was a team player and to help out the embattled Freeman.

Were these circumstances characteristic of true disciplinary action? We think not, but instead view them as indicative of a joint damage-control operation by Freeman and Hunsaker which, it was hoped, would extinguish the heat both were feeling, preserve for Hunsaker his full salary and minimize his inconvenience and psychic discomfort while preserving the possibility for his return to Des Moines once the scrutiny on DES had subsided.

We conclude that Hunsaker was not disciplined for his FY 89 job performance when he was voluntarily reassigned to the Cedar Rapids district supervisor position. Having reached that conclusion, it necessarily follows that Hall v. Iowa Merit Employment Comm'n., supra, dealing as it does with instances of discipline after the imposition of earlier discipline, does not require a conclusion that Eisenhauer was precluded from discharging Hunsaker on the basis of his FY 89 job performance.

III.

The second prong of Hunsaker's argument that a legal bar existed which precluded his discharge by Eisenhauer is also premised upon an application of the doctrine of industrial double jeopardy.

Hunsaker maintains that even if his reassignment to Cedar Rapids did not constitute discipline, he still could not be properly discharged for his conduct during FY 89 because it had been the subject of a prior evaluation and personnel action which had been decided upon after Freeman, possessing essentially all of the facts Eisenhauer possessed on the date of Hunsaker's discharge, had fully considered all options, including Hunsaker's discharge, and had elected to follow some other course.

In essence, Hunsaker argues that even if he was not disciplined, he was placed in jeopardy by Freeman's mere consideration of discipline, and that Eisenhauer's later action thus amounts to disciplinary double jeopardy.

Although early in his brief Hunsaker recognizes that the language upon which he premises this prong of his argument is found in a manual distributed by IDOP to the state's managers and supervisors,[30] thereafter, in both his brief and in his oral argument to us, he directly identifies the source of the relied-upon language as a IDOP rule.[31]

The language upon which this portion of Hunsaker's argument relies is in fact found in §11.20 of a resource guide issued by IDOP entitled Personnel Management For Managers & Supervisors, commonly referred to as the "supervisors' and managers' manual". Section 11.20 of that work is entitled "Progressive Discipline" and purports to define that term as well as the term "just cause". The "just cause" definition purports to list its "elements", one of which reads as follows:

> 3. Progressive Discipline -- It may be inappropriate to always give the same penalty for a particular offense depending on the unique circumstances surrounding the

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[30]Employee-appellant's post-hearing brief at p. 5.

[31]Employee-appellant's post-hearing brief at p. 12.

incident(s) involved. Penalties of increasing severity should be applied to repeated offenses until the behavior is corrected. Most offenses are handled by following an established Step-by-Step procedure (See Section 11.15). Supervisors should not use incidents of past misconduct which were not properly documented or disciplined at the time they happened as justification for the current level of discipline. Undocumented, oral warnings are less effective in improving the employee's conduct than a properly documented case of misconduct which results in progressive discipline. (Emphasis ours.)

The language emphasized above is that which Hunsaker relies upon in arguing that even if his reassignment to Cedar Rapids was not discipline, this "rule" nonetheless protects him from subsequent discipline on the basis of his FY 89 performance since the "rule" prevents that conduct, which was "not properly disciplined" at the time, from forming the basis for Eisenhauer's later imposition of discipline.

The obvious response to this prong of Hunsaker's argument is that the language he identifies as a part of IDOP rule 11.2 does not enjoy that status. Nowhere in IDOP rule 11.2(19A) does the quoted language appear, nor does our reading of that rule reveal language of similar import. What Hunsaker identifies as a valid administrative rule is nothing more than IDOP's attempt to provide the state's supervisors and managers with advice on a personnel matter they may encounter in the course of their employment. As such, it does not possess the binding effect which Hunsaker would have us give it.[32]

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[32]Nor are we firmly convinced that the language, even if it were included within a valid administrative rule, would have the effect Hunsaker would give it. Taken in context, it appears to us at least equally likely that the passage Hunsaker relies upon does not deal with disciplinary double jeopardy at all, but instead

Although not possessing the effect attributed to it by Hunsaker, the question remains whether the previously-emphasized language is a correct statement of the law governing employee discipline. If interpreted in one possible fashion,[33] we believe that it is. However, we cannot subscribe to the application of the language advanced by Hunsaker.

The concept of industrial double jeopardy appears to have originated with private-sector grievance arbitrators, who borrowed the concept from constitutional provisions applicable to criminal prosecutions and applied it in the employment relations arena. Arbitrators' articulations of the doctrine differ to a point. Some find it applicable only when an employee is actually disciplined twice for the same offense.[34] Other arbitrators, applying a more liberal version of the doctrine, do not require the actual imposition of prior discipline, but instead consider the doctrine applicable whenever there has been a final disposition of the matter which is then followed by the imposition of discipline for the same conduct previously put to rest.[35]

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simply warns supervisors that past employee sins which were not documented or disciplined should not be considered or relied upon when imposing discipline for a subsequent occurrence of conduct which the supervisor may believe warrants discipline.

[33]See footnote 32 supra.

[34]See, e.g., International Harvester Co., 16 L.A. 616 (W.P. McCoy, Arbitrator, 1951); United States Air Force, 69 L.A. 1224 (J.A. Bailey, Arbitrator, 1977).

[35]See, e.g., Diamond Gardner Corp., 32 L.A. 581 (R.A. Smith, Arbitrator, 1959); Boise Cascade Corp., 74 L.A. 1012 (G.E. Bowles, Arbitrator, 1980); Todd-Pacific Shipyards, 86 L.A. 171 (J.N. Draznin, Arbitrator, 1985).

Were we to apply the more strict approach, which requires the actual imposition of discipline in order for the doctrine to apply, our inquiry would be at an end due to our conclusion in Division II, supra, that Hunsaker's voluntary reassignment to Cedar Rapids did not constitute the imposition of discipline. We believe that Hall v. Iowa Merit Employment Comm'n., supra, would provide substantial support for the application of this strict approach. Our reading of Hall leads us to the conclusion that two facts -- the imposition of the initial employee discipline and that discipline becoming the final agency action -- were the keys relied upon the court in determining that the subsequent discipline of the employee for the same misconduct could not be affirmed.

However, even were we to apply the more liberalized version of the doctrine and require only the element of "final disposition" of the potentially-disciplinary situation, even that would not result in our concluding that the doctrine has applicability to Hunsaker, for we cannot conclude that Freeman ever made such a final disposition.

As set out in Division II, supra, our review of the record leads us to the conclusion that Freeman and Hunsaker had agreed upon a course of action designed to reduce the external pressure both were feeling in the fall of 1989. By its design, however, the plan left Freeman with remaining options, and left Hunsaker with the possibility of a return to Des Moines in his PSE IV classification.

Jackie Mallory, whose testimony we credit more heavily than that of Freeman, testified that Freeman indicated that Hunsaker's assignment to Cedar Rapids was temporary. The conclusion that Freeman did not consider Hunsaker's reassignment to be final is further bolstered by Mallory's testimony that Freeman specifically indicated that the PSE IV vacancy which would be created by Ken Hayes' upcoming retirement as chief of the Staff Services Bureau would be held open, and that Hunsaker might return in that position and be Mallory's direct supervisor -- an apparently-unpleasant prospect for Mallory in view of friction which had previously existed between her and Hunsaker. The idea that Freeman did in fact plan to hold Hayes' position open following his retirement is not directly controverted by Freeman, and is corroborated by a feature of his DES reorganization which took affect on December 22, 1989. As an element of that plan, the Staff Services Bureau was to be reorganized upon Hayes' retirement, and would then temporarily report to Deputy Director Mathiasen. It appears, however, that all other vacancies contemplated by the reorganization were immediately filled, even if only on an interim basis.

The impression we are left with from our review of the record is that Freeman was consciously avoiding a final disposition regarding Hunsaker in order to keep his options open. While there is no evidence to indicate that he ever committed absolutely to Hunsaker's return to Des Moines, in Hayes' position or any other, Freeman had created a situation where, should the storm then upon DES blow over, he could return Hunsaker to Des Moines.

Alternatively, should the heat continue, he could leave Hunsaker in Cedar Rapids or, conceivably, in view of the voluntary, non-disciplinary nature of Hunsaker's reassignment, even dismiss him for his negligence as FOB chief should the scrutiny become so intense that Freeman began to feel that Hunsaker's termination was the only way to preserve his own position.

Hunsaker argues that since both Freeman and Mallory acknowledge a discussion which included the mention of Hunsaker's dismissal as one of Freeman's personnel alternatives, it has been established that Freeman considered, but finally rejected, Hunsaker's dismissal as an option. While the record does establish that Hunsaker's dismissal was mentioned as one of Freeman's alternatives, we do not believe that fact establishes that a final disposition of the Hunsaker matter was reached by Freeman. The mere fact that a supervisor may momentarily consider the discharge of a subordinate, then shelve the idea temporarily and take some interim non-disciplinary action which preserves the supervisor's options, should not and, we believe, does not create an absolute bar preventing that employee's later dismissal for just cause.

We conclude that even if the liberalized version of the disciplinary double jeopardy doctrine is applied to the circumstances of this case, no legal barrier to Eisenhauer's dismissal of Hunsaker was raised because Freeman never took what was intended to be final action on the matter of Hunsaker's employment status.

In summary, we have concluded that no legal bar to Director Eisenhauer's dismissal of Hunsaker existed, and that just cause for Hunsaker's termination as an employee of the Department of Employment Services has been established. Consequently, we conclude that the ALJ reached the proper result when she recommended that Hunsaker's appeal from the decision of the IDOP director be denied.

IT IS THEREFORE ORDERED that James A. Hunsaker III's appeal be and is hereby dismissed.

DATED at Des Moines, Iowa this 14th day of August, 1991.

PUBLIC EMPLOYMENT RELATIONS BOARD

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